Massachusetts Department of ENVIRONMENTAL PROTECTION

M C P Q & A

November 2007

eDEP

Q. 1 How does a "Person Making a Submittal" via eDEP sign the submittal?

Both the LSP and the "Person Making the Submittal" (typically the PRP) must register in eDEP. To register, go to the MassDEP homepage and click on eDEP online filing https://edep.dep.mass.gov/DEPHome.aspx. The registration process is similar to creating any online account with a user name and password. Registration by the LSP also requires submitting a stamped (with his/her LSP stamp) Proof of Identity form to MassDEP. The PRP does not need to submit a Proof of Identity form. The eDEP sharing function allows BWSC documents to be shared, edited and electronically signed by both parties. Signatures on paper copies are not required if a submittal is made through eDEP. The electronic signature is the legal signature for the document.

Q. 2 Is an electronic signature the legal equivalent of a written signature?

Yes. Case law has established the legality of electronic signatures and found that electronic signatures carry the same legal authority as a handwritten signature. The use of the electronic signature is appropriate and legally equivalent to a handwritten signature for eDEP submittals.

Q. 3 To whom can I address questions about eDEP?

As a first step, consult the BWSC "Frequently Asked Questions" on eDEP at: http://www.mass.gov/dep/cleanup/approvals/edepfaq.htm. If your question is not addressed by the FAQs, you may email your question to BWSC.eDEP@state.ma.us.

Q. 4 Why can't I, as the LSP, upload my supporting documentation after my client (the PRP) signs the eDEP transmittal?

The PRP certifies both the form and the work, including supporting documentation. To ensure that the electronic process does not circumvent the ability of a PRP to review the supporting documentation, the upload of the final supporting documentation must take place before the PRP certification step.

Risk Characterization

Q. 5 Why does the MassDEP Method 3 Human Health Risk Assessment Short Form show unacceptable risk for some chemicals when the Exposure Point Concentration is below the chemical's Method 1 standard?

The Method 3 Human Health Risk Assessment Short Forms are designed to calculate human health risk only and do not incorporate other considerations. The Method 1 cleanup standards are based on several factors, including human health risk, background, odor thresholds, leaching potential, Practical Quantitation Limits, and consistency with other regulatory standards (such as the Massachusetts Maximum Contaminant Levels and Office of Research and Standards Guidelines for drinking water). Examples of Method 1 soil standards that are not based strictly on human health risk include arsenic, PCBs, lead, zinc, chlordane and naphthalene. Examples of Method 1 groundwater standards that are not based strictly on human health risk include cyanide, PCBs, xylenes and naphthalene. It is important to note that although risk may not govern the Method 1 standard for a particular chemical, it is considered for all chemicals. See MCP Numerical Standards Spreadsheets on the MassDEP website for the basis of all Method 1 soil and groundwater standards at http://mass.gov/dep/service/compliance/riskasmt.htm.

Q. 6 When conducting a Method 3 Risk Characterization, can a subchronic Hazard Index (HI) be higher than a chronic HI?

Yes. The subchronic risk estimate for seasonal exposure to a chemical may be higher in cases where two conditions occur: (1) the estimated subchronic average daily dose is higher than the chronic because it does not include the seasons of the year when exposure is not occurring (for example, a residential subchronic average daily dose includes only the 7 months during which exposure to soil is assumed to occur, while a residential chronic average daily dose is averaged over 7 years, and therefore includes the 5-month part of each year when no exposure is assumed); and (2) the reference dose for the subchronic exposure is the same as the reference dose for a chronic exposure (i.e., when there is not enough information to identify a lower, less conservative reference dose to characterize subchronic risks). When these two conditions occur at the same time, the higher calculated subchronic dose is divided by a reference dose that is the same for chronic risks, resulting in a higher hazard quotient for subchronic exposures.

This does not mean that short-term risks from subchronic exposures could actually be more hazardous than long-term exposures to the same concentration. Rather, it means that risk estimates based on lower frequency chronic exposures could underestimate risks from higher frequency subchronic exposures.

Public Involvement

Q. 7 Is notification of environmental sampling pursuant to 310 CMR 40.1403(10) required when sampling is conducted on a right-of-way or any other property owned by a municipality?

Massachusetts Department of
Environmental Protection
One Winter Street
Boston, MA 02108-4746

Commonwealth of Massachusetts
Deval Patrick, Governor
Tim Murray, Lt. Governor

Executive Office of
Energy & Environmental Affairs
Ian A. Bowles, Secretary

Department of
Environmental Protection
Laurie Burt, Commissioner

Produced by the
Bureau of Waste Site Cleanup,
November 2007.
Printed on recycled paper

This information is available in alternate format by calling our ADA Coordinator at (617) 292-5565.

Yes. This assumes the sampling is being conducted by a party other than the municipality. Pursuant to 310 CMR 40.1403(10), written notice of such sampling on BWSC Form 123 (Notice of Environmental Sampling) should be given to the Chief Municipal Officer.

Q. 8 Is notification of environmental sampling pursuant to 310 CMR 40.1403(10) required when sampling is conducted on a right-of-way or any other property owned by the Commonwealth?

Yes. This assumes the sampling is being conducted by a party other than an agency or agent of the Commonwealth. Pursuant to 310 CMR 40.1403(10), written notice of such sampling on BWSC Form 123 (Notice of Environmental Sampling) should be sent to the district or regional office of the state authority that oversees the property. In the case of state roads, notices should be mailed to the appropriate MassHighway district office. MassHighway district office addresses may be found at http://www.mhd.state.ma.us/default.asp?pgid=dist/distRoot&sid=wrapper&iid=dist/dist.asp

Remedial Monitoring Report

Q. 9 The Remedial Monitoring Report (RMR) form on eDEP requires disclosure of "prolonged (greater than 25 percent of Reporting Period) unscheduled shutdowns of the Active Remedial System." How is this calculated in a multi-component system, e.g., air-sparging operation coupled with an SVE Unit? If one component is off-line 30 percent of the time, while the other is off-line 10 percent of the time, is it permissible to average?

No. All critical components of a multi-component system must be operational for at least 75 percent of the reporting period to avoid the disclosure requirement. A critical component is a major system component without which the overall system will not operate to achieve the performance requirements identified in the applicable remedial plan (e.g., IRA Plan, RAM Plan, and Remedy Implementation Plan).

Q. 10 Is a sub slab ventilation system (SSV) or sub slab depressurization system (SSD) considered an Active Remedial System under the MCP, therefore requiring a Remedial Monitoring Report (RMR)?

Yes, unless it is a passive system. An RMR is required in cases where the remedial actions involve Active Operation and Maintenance of a remedy. Active Operation and Maintenance includes use of an Active Remedial System or Active Remedial Monitoring Program (see 310 CMR 40.0006 for the definition of these terms). An SSV or SSD is considered an Active Remedial System under the MCP if it includes a mechanical or electro-mechanical device that recovers or discharges

Massachusetts Department of
Environmental Protection
One Winter Street
Boston, MA 02108-4746

Commonwealth of Massachusetts
Deval Patrick, Governor
Tim Murray, Lt. Governor

Executive Office of
Energy & Environmental Affairs
Ian A. Bowles, Secretary

Department of
Environmental Protection
Laurie Burt, Commissioner

Produced by the
Bureau of Waste Site Cleanup,
November 2007.
Printed on recycled paper

This information is available in alternate format by calling our ADA Coordinator at (617) 292-5565.

contaminated soil gas to prevent exposure to vapor-phase contaminants. An RMR is required for such an SSV or SSD.

An SSV or SSD is not considered an Active Remedial System if it does not rely on the use of a mechanical or electro-mechanical device. An RMR is not required for such an SSV or SSD.

Downgradient Property Status (DPS)

Q. 11 If a property owner with DPS sells the property, is the DPS automatically transferred to the buyer of the property?

No, DPS runs with the person and not with the property. If the new owner of the property wishes to obtain DPS, and the former owner agrees, the new owner may acquire DPS pursuant to 310 CMR 40.0187, which provides for the modification of an existing DPS Submittal. The effect of this modification is to add the new owner as a party who has DPS. The former owner also retains DPS, which is why this process is considered a modification rather than a transfer. A new owner who acquires DPS by such a modification must comply with 310 CMR 40.0185.

In cases where the former owner cannot be located or will not agree to such a modification, the new owner may file a new DPS Submittal to MassDEP.

Q. 12 What is the relationship between the DPS provisions of the MCP and the liability relief for downgradient properties in Section 5D of M.G.L. c. 21E?

The MCP DPS provisions provide the procedures and criteria to obtain and maintain DPS as a regulatory status. This status has the effect of suspending the assessment of Tier I/II annual compliance fees and the requirements to conduct Tier Classification and Comprehensive Response Actions for a person who has and maintains such status. M.G.L. c. 21E Section 5D provides certain downgradient property owners with relief from liability to the Commonwealth or any other persons for contribution, response costs or property damage related to oil or hazardous material releases that have migrated onto their property from an upgradient source. The MCP and the statutory DPS provisions are closely aligned, but not identical. Parties are advised to carefully read all the DPS regulatory and statutory provisions.

Q. 13 A person filing a DPS Submittal must certify that "no act of such person has contributed to the release … or caused such release to become worse than it otherwise would have been" (see 310 CMR 40.0183(2)(c)). What are examples of actions or activities by a downgradient property owner or operator that may contribute to or worsen a release originating from an upgradient property?

Massachusetts Department of
Environmental Protection
One Winter Street
Boston, MA 02108-4746

Commonwealth of Massachusetts
Deval Patrick, Governor
Tim Murray, Lt. Governor

Executive Office of
Energy & Environmental Affairs
Ian A. Bowles, Secretary

Department of
Environmental Protection
Laurie Burt, Commissioner

Produced by the
Bureau of Waste Site Cleanup,
November 2007.
Printed on recycled paper

This information is available in alternate format by calling our ADA Coordinator at (617) 292-5565.

Examples of acts that may *contribute* to a release observed at a downgradient property include (i) disposal of OHM by the downgradient property owner onto the upgradient property; and (ii) discharge of OHM into a sewer or drain that extends onto the upgradient property, to the extent that such activities result in a release of OHM on the upgradient property.

Examples of acts that may *worsen* a release observed on a downgradient property include (i) installation and operation of irrigation wells, subsurface drains, or stormwater infiltration systems on the downgradient property that alter contaminant plume movement, exposures, exposure point concentrations, and/or remedial feasibility; and (ii) grading or building construction activities that create new contaminant migration or exposure pathways.

Q. 14 A person filing a DPS Submittal must certify that "such person is not, and was not at any time, affiliated with any other person (i) who owned or operated the property from which the release … originated, or caused such release, and (ii) who is potentially liable under M.G.L. c. 21E for the disposal site through any direct or indirect contractual, corporate or financial relationship other than (1) that established by any instrument creating such person's interest in the downgradient property; or (2) that established by an instrument wholly unrelated to the disposal site and which would not otherwise render such person potentially liable as a result of the relationship" (see 310 CMR 40.0183(2)(d)). Please clarify the exceptions to this "affiliation" provision.

Two important exceptions to the "affiliation" provision are as follows. First, a person is not disqualified from asserting DPS simply as a result of acquiring an interest in the downgradient property from the owner of the upgradient property. In other words, if the upgradient and downgradient properties have a common owner, and another person acquires the downgradient property from the common owner, this other person may still qualify for DPS. Second, a person is not disqualified from DPS because of a contractual, corporate or financial relationship with the owner of the upgradient property created by an instrument (partnership agreement, trust, mortgage) if that instrument is completely unrelated to the disposal site.

Q. 15 A DPS Opinion shall be based on investigative and assessment actions of sufficient scope and level of effort to conclude that OHM migrated onto a downgradient property from an upgradient property (see 310 CMR 40.0183(4)). What level of effort is necessary to demonstrate "migration" of OHM onto a downgradient property?

Massachusetts Department of
Environmental Protection
One Winter Street
Boston, MA 02108-4746

Commonwealth of Massachusetts
Deval Patrick, Governor
Tim Murray, Lt. Governor

Executive Office of
Energy & Environmental Affairs
Ian A. Bowles, Secretary

Department of
Environmental Protection
Laurie Burt, Commissioner

Produced by the
Bureau of Waste Site Cleanup,
November 2007.
Printed on recycled paper

This information is available in alternate format by calling our ADA Coordinator at (617) 292-5565.

The necessary level of effort is property-specific, and is primarily a function of site and hydrogeologic features and complexities.

For groundwater situations, a lower level of effort will generally suffice for a site with the following characteristics:

- The OHM of interest have never been used on the downgradient property;
- At least 3 (triangulated) groundwater monitoring wells have provided clear evidence of groundwater flow direction toward the downgradient property, which is unlikely to vary with seasonal or tidal influences;
- The hydraulic gradient is greater than 0.003 feet/feet;
- The groundwater table elevation is below the invert elevation of subsurface utilities and/or structures; and
- Testing of at least 3 (triangulated) groundwater monitoring wells in the same geologic unit demonstrate a clear concentration gradient for the OHM of interest, with the highest levels at or near the upgradient property line.

While it is possible to successfully demonstrate DPS for properties without one or more of the characteristics listed above, such cases will necessarily require more effort, discussion, and rationale, and the development and presentation of an adequate Conceptual Site Model.

On the other hand, a higher level of effort is required when significant concentrations of the OHM of interest is present in the vadose zone on the downgradient property, since this may be indicative of a possible source area on the downgradient property. This possibility needs to be investigated and ruled out to support a DPS Submittal.

Ultimately, the onus is on the owner or operator of the downgradient property and the LSP to "make the case" for DPS. At some properties, it may simply not be possible to support such a finding, given site features (e.g., flat, paved industrial park with numerous subsurface conduits beneath the groundwater table), an inability to establish groundwater flow direction (due to access or building issues), and/or history of OHM use. While these confounding conditions for supporting DPS are unfortunate, they do not justify an unsupported submittal.

Q. 16 To maintain DPS, activities on the downgradient property that could prevent or impede the implementation of reasonably likely response actions must be avoided (310 CMR 40.0185(1)(b) & (f)).

Massachusetts Department of
Environmental Protection
One Winter Street
Boston, MA 02108-4746

Commonwealth of Massachusetts
Deval Patrick, Governor
Tim Murray, Lt. Governor

Executive Office of
Energy & Environmental Affairs
Ian A. Bowles, Secretary

Department of
Environmental Protection
Laurie Burt, Commissioner

Produced by the
Bureau of Waste Site Cleanup,
November 2007.
Printed on recycled paper

This information is available in alternate format by calling our ADA Coordinator at (617) 292-5565.

How does this affect the development potential of downgradient properties?

This requirement does not prevent development of the downgradient property, and in most cases development activities may occur on the downgradient property in a manner that will not conflict with this requirement or exacerbate the plume. However, it is imperative that this requirement be considered when planning development activities on the downgradient property, and modifications to such activities may be necessary. In cases where a proposed structure could prevent or impede future response actions, it is possible to conduct a focused assessment and remedial program within the footprint of the proposed structure, in accordance with the provisions of 310 CMR 40.0442(3).

Ideally, development plans should be coordinated between the owners and operators of the downgradient property and person(s) conducting response actions at the upgradient disposal site source property.

Q. 17 Does overland flow constitute surface water for purposes of DPS eligibility?

No, DPS applicability does not extend to overland flow. The overland flow pathway is different from the groundwater or streamflow migration pathways that are clearly covered by the DPS provisions. With contaminant migration through groundwater or streamflow, sampling data can demonstrate contaminant migration from an upgradient location or locations. With overland flow, a distinct migration pathway is often not evident or traceable.

Post-RAO

Q. 18 A RAM is being conducted at a site to remove NAPL. The PRP plans to file a Class C-1 RAO and continue NAPL removal operations. Under what MCP remedial action would this occur?

If the NAPL removal operations are needed to achieve and maintain the Class C-1 RAO, a RAM Completion Statement should be filed, and the NAPL removal operations continued as a Post Class C Operation, Maintenance, and/or Monitoring activity pursuant to 310 CMR 40.0897, addressed via the Status and Remedial Monitoring Report provisions of 310 CMR 40.0898. If the NAPL removal operations are not needed to achieve and maintain the Class C-1 RAO, the NAPL removal operations may continue as a RAM, addressed via the Status and Remedial Monitoring Report provisions of 310 CMR 40.0445.

Q. 19 Does the requirement that OHM sources be eliminated, controlled, or mitigated to the extent feasible for Class C RAOs apply to Class C RAOs filed prior to April 3, 2006 (the effective date of this requirement)?

Massachusetts Department of
Environmental Protection
One Winter Street
Boston, MA 02108-4746

Commonwealth of Massachusetts
Deval Patrick, Governor
Tim Murray, Lt. Governor

Executive Office of
Energy & Environmental Affairs
Ian A. Bowles, Secretary

Department of
Environmental Protection
Laurie Burt, Commissioner

Produced by the
Bureau of Waste Site Cleanup,
November 2007.
Printed on recycled paper

This information is available in alternate format by calling our ADA Coordinator at (617) 292-5565.

At the time of the next required 5-year Periodic Evaluation for Temporary Solutions (i.e., Class C RAOs), the PRP must indicate whether the Class C RAO status is Class C-1 or C-2. With that submittal, it will be necessary to ensure that the disposal site meets the performance standards for Class C RAOs. Both Class C-1 and Class C-2 RAOs require that the source be eliminated, controlled or mitigated to the extent feasible in accordance with 310 CMR 40.1050(1) and 40.1003(5)(b).

Transmittal Forms

Q. 20 For which submittals do grace periods apply, and how long are the grace periods? For which submittals do the grace periods not apply?

The due dates for MCP submittals are specified in the provisions related to a given submittal. For example, the due date for a Tier Classification Submittal is specified in 310 CMR 40.0501(3). 310 CMR 40.0008 specifies the grace period that applies to the due date for various submittals.

Due to varying mail service and distribution, a 7-day grace period from the actual due date is allowed for most submittals sent by mail. In other words, the submittal is considered received on time if the document is received within 7 calendar days of the actual submittal due date. If the actual submittal due date falls on a weekend, holiday or any other day MassDEP offices are closed, the due date runs to the end of the next business day and the 7-day grace period is calculated from that day. If the 7th day of the grace period falls on a weekend, holiday or any other day MassDEP offices are closed, the last day of the 7-day grace period is the next business day.

The following are NOT subject to this 7-day grace period:

- Notifications required by 310 CMR 40.0300, including Notification of Releases, Threats of Release and Imminent Hazards
- The date of MassDEP's receipt of a written request for approval of an IRA
- The computation of time periods for timely action for Tier I Permits. (Note: Tier I Permit Applications are subject to the 7-day grace period only if a copy of the permit application fee remittance is attached to the application and the applicant certifies that the application fee has been mailed or hand-delivered to MassDEP concurrent with submittal of the application).
- Submittals required by Interim Deadlines
- Submittals required by Notices of Noncompliance

Massachusetts Department of
Environmental Protection
One Winter Street
Boston, MA 02108-4746

Commonwealth of Massachusetts
Deval Patrick, Governor
Tim Murray, Lt. Governor

Executive Office of
Energy & Environmental Affairs
Ian A. Bowles, Secretary

Department of
Environmental Protection
Laurie Burt, Commissioner

Produced by the
Bureau of Waste Site Cleanup,
November 2007.
Printed on recycled paper

This information is available in alternate format by calling our ADA Coordinator at (617) 292-5565.

- Any deadline in any MassDEP enforcement order, penalty assessment or other enforcement document.

These exceptions to the 7-day grace period are set forth in more detail in 310 CMR 40.0008(5).

Groundwater

Q. 21 While performing due diligence on a site where an RAO has been filed, it is discovered that a nearby municipal well that had an Interim Wellhead Protection Area (IWPA) (Figure 1) now has a Zone II boundary that extends onto the site property (Figure 2). The RAO relied on GW-2 and GW-3 standards when filed. If the RAO was valid at the time it was filed and current groundwater concentrations are consistent with or lower than concentrations at the time the RAO was filed, is the RAO still valid, or are additional response actions required?

See http://www.mass.gov/dep/cleanup/laws/swap899.htm for details on this issue. For a disposal site where a Permanent Solution (Class A or B RAO) was achieved prior to the delineation of the Zone II boundaries, additional remedial action as a result of the newly delineated Zone II is not required unless the RAO is not protective of actual current or foreseeable exposures associated with the previously identified IWPA, as described in 310 CMR 40.0900 and 310 CMR 40.1000. This is true even where groundwater concentrations exceed the drinking water standards. (Re-notification is also not required pursuant to 310 CMR 40.0317(17)).

For a site that has achieved only a Temporary Solution (Class C RAO) and is located within a Zone II, however, the GW-1 cleanup criteria must be met before a Class A or B RAO can be achieved.

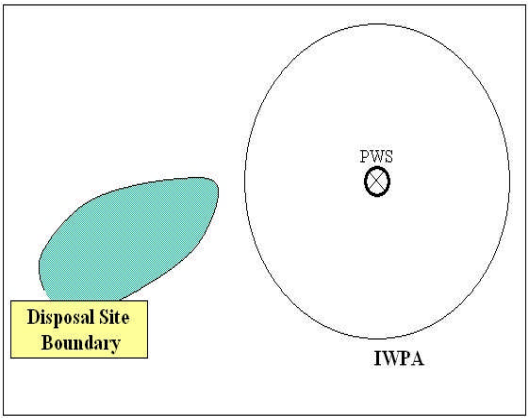

Figure 1

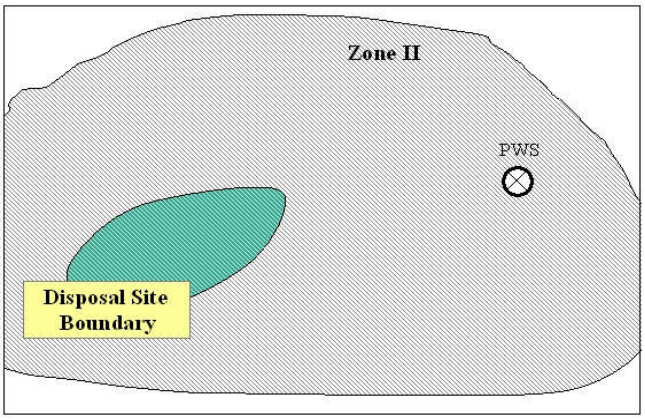

Figure 2

Massachusetts Department of Environmental Protection
One Winter Street
Boston, MA 02108-4746

Commonwealth of Massachusetts
Deval Patrick, Governor
Tim Murray, Lt. Governor

Executive Office of Energy & Environmental Affairs
Ian A. Bowles, Secretary

Department of Environmental Protection
Laurie Burt, Commissioner

Produced by the Bureau of Waste Site Cleanup, November 2007.
Printed on recycled paper

This information is available in alternate format by calling our ADA Coordinator at (617) 292-5565.

AULs

Q. 22 Can an AUL be used to prohibit gardening at a current residential unit without a garden? Does the type of residence (single family home versus condominium) make a difference?

An AUL cannot be used to eliminate current or reasonably foreseeable use. However, an AUL can be used to prohibit gardening at condominium residences where by-laws exist that prohibit gardening or at condominiums or other multi-family residences where the limitations on space make gardening impossible, so that this activity can be credibly eliminated as a current or reasonably foreseeable use (e.g., entire lot, with the exception of small, landscaped areas, is occupied by the residential building(s) and parking lot/structure).

Gardening should not be eliminated as a current or reasonably foreseeable use at single-family homes or any condominium or other multi-family residence where gardening is not prevented by by-law or current space limitations.

Q. 23 When an AUL requires the maintenance of multiple barriers, is it necessary to delineate each barrier separately?

Yes. When an AUL requires the maintenance of multiple barriers (e.g. pavement and a building), the AUL must delineate the location of each barrier. The AUL serves to identify the location of the barriers so that a property owner (particularly a future property owner) knows the location of the barriers that must be maintained (see 310 CMR 40.1074(2)(e)). Separate delineation of each barrier is required.

Q. 24 How do I delineate barriers within the area subject to the AUL?

The boundaries of the area subject to the AUL must be depicted on a survey plan. If there is a barrier (e.g., some form of cap, pavement or building) *within* the boundaries of the AUL area that must be maintained to ensure a level of No Significant Risk, that barrier must also be depicted on either a sketch or survey plan. Which type of plan is required for the barrier depends on whether the restrictions that apply in the barrier area are the same or different from the restrictions that apply in the larger AUL area. If, for example, the AUL area includes both landscaping and pavement and the restrictions of the AUL are the same for both paved and landscaped areas (e.g. no excavation below 5 feet), the boundaries of the pavement and landscaped areas do not need to be surveyed. In such a case, a sketch plan will suffice to delineate the boundaries of the pavement and landscaped areas within the larger AUL area boundaries. If, on the other hand, an AUL restricts any or all "excavation under paved areas" and the paved areas represent only a

Massachusetts Department of
Environmental Protection
One Winter Street
Boston, MA 02108-4746

Commonwealth of Massachusetts
Deval Patrick, Governor
Tim Murray, Lt. Governor

Executive Office of
Energy & Environmental Affairs
Ian A. Bowles, Secretary

Department of
Environmental Protection
Laurie Burt, Commissioner

Produced by the
Bureau of Waste Site Cleanup,
November 2007.
Printed on recycled paper

This information is available in alternate format by calling our ADA Coordinator at (617) 292-5565.

portion of the AUL area (e.g. there are grassy areas which do not have exactly the same restrictions as the paved areas), a survey of the paved area is required because the excavation restriction applies only to the paved areas. The same reasoning would apply to cases where there are multiple barriers within the AUL area or different zones and restrictions within an area covered by a single barrier.

Q. 25 Is it appropriate to record/register an AUL that references the presence and maintenance of barriers not yet in place?

No. It is not appropriate for an AUL to reference a barrier not yet in place if the barrier is necessary to achieve and maintain a condition of No Significant Risk as part of a Permanent Solution (see 310 CMR 40.0923(4)). The reason for this is two-fold: (1) barriers do not serve to prevent exposure until they are in place; and (2) the AUL cannot delineate the location of barriers until they are in place.

Q. 26 Can an AUL be placed on a residential property? If so, under what circumstances may an AUL be used?

An AUL can be placed on a single-family or multi-family residential property. If applicable Method 1 soil standards are exceeded in the top 15 feet of soil at a disposal site, a Method 3 risk characterization may be conducted to evaluate whether a condition of No Significant Risk exists for residential use (see 310 CMR 40.0933(4)&(5) and 40.1012(4)). A Method 3 risk characterization allows parties to consider reduced exposure potential that exists or will result from adequate barriers. Adequate barriers may include, but are not limited to, pavement, buildings and three feet or more of clean soil cover. An AUL that identifies and delineates these barriers and specifies how they are to be maintained must be implemented prior to submitting the RAO in order to be considered in a Method 3 risk characterization.

Q. 27 When a Method 3 risk characterization demonstrates that a condition of No Significant Risk has not been achieved in a future residential scenario for direct contact with contaminated soil, is it appropriate, absent remedial measures, for an AUL to permit residential use "provided specific measures are taken to prevent contact with contaminated soil"?

No. Once it is demonstrated that a condition of No Significant Risk has not been achieved in a future residential scenario, future residential use would be inconsistent with the residual contamination on the property *absent additional remedial measures*. Future site uses must be limited to those that will pose No Significant Risk, with an appropriate AUL.

Q. 28 An AUL was implemented as part of the remedy to address a past release. Subsequently, another release occurred at the property. If an AUL is selected as part of the remedy for the more

Massachusetts Department of
Environmental Protection
One Winter Street
Boston, MA 02108-4746

Commonwealth of Massachusetts
Deval Patrick, Governor
Tim Murray, Lt. Governor

Executive Office of
Energy & Environmental Affairs
Ian A. Bowles, Secretary

Department of
Environmental Protection
Laurie Burt, Commissioner

Produced by the
Bureau of Waste Site Cleanup,
November 2007.
Printed on recycled paper

This information is available in alternate format by calling our ADA Coordinator at (617) 292-5565.

recent release, do I need to implement a second, separate AUL or can this newer condition be covered under the existing AUL?

If the soil contamination in the area of the second release does not extend beyond the existing AUL area boundaries, an AUL Amendment may be used to add the second RTN to the existing AUL and make any language changes necessary to maintain a condition of No Significant Risk for both releases. Alternatively, a second AUL can be implemented for the second release.

If, however, the original AUL was implemented on a portion of the property, and the residual soil contamination in the area of the second release extends beyond the existing AUL area boundaries, then a second AUL is necessary to define the AUL area for the second release. This second AUL is completely separate from the original AUL. Care should be taken to ensure that the conditions outlined in the two AULs are not contradictory.

In either of these situations, the property owner always has the option of terminating the existing AUL using Form 1084C, Termination of Notice of Activity and Use Limitation, and immediately thereafter implementing a new AUL that would account for both releases on the property. This new AUL would identify both RTNs, include the residual soil contamination from both RTNs within the AUL area boundary, and include language adequate to maintain a condition of No Significant Risk for both RTNs, consistent with each risk characterization.

Q. 29 When a property subject to an AUL is subdivided through the AUL area, and the owner of one of the parcels on which the AUL area is located wishes to implement an AUL Amendment, is a new metes and bounds description required with the AUL Amendment?

No. There is no requirement in the MCP for a revised metes and bounds description to be attached to the AUL Amendment. During a title exam, the survey plan referenced in the AUL, when reviewed in conjunction with the survey plan referenced in the deed for the subdivision, should enable the reviewer to determine on which portion of the parcel the AUL Amendment applies.

However, it is customary in real estate practice to include information to clarify title. To assist with the clarity of title, it may be to the owners' benefit to include revised metes and bounds descriptions with the AUL Amendment to avoid confusion as to where the AUL Amendment applies. An experienced real estate attorney should be consulted in these situations.

It is important to note that a property owner can amend only the portion of the AUL area he or she owns.

Q. 30 Pursuant to 310 CMR 40.1074(1)(e), "current holders of any record interest(s)" in the AUL area shall be notified of the existence and location of oil and/or hazardous material and the terms of the

Massachusetts Department of
Environmental Protection
One Winter Street
Boston, MA 02108-4746

Commonwealth of Massachusetts
Deval Patrick, Governor
Tim Murray, Lt. Governor

Executive Office of
Energy & Environmental Affairs
Ian A. Bowles, Secretary

Department of
Environmental Protection
Laurie Burt, Commissioner

Produced by the
Bureau of Waste Site Cleanup,
November 2007.
Printed on recycled paper

This information is available in alternate format by calling our ADA Coordinator at (617) 292-5565.

AUL prior to recording the AUL. How do I know if there are current holders of any record interest for the property to be subject to the AUL?

"Current holders of any record interest" are those individuals or entities that have an interest in the subject property on record at the Registry of Deeds or registered in the Land Registration Office, whichever is applicable. These interest holders include mortgage holders, lessees or tenants if the lease is recorded at the Registry of Deeds or registered in the Land Registration Office, and easement or license holders if such easement or license passes through the AUL area. Property abutters are not record interest holders simply because they abut the property to be subject to the AUL.

A record interest is "current" if the interest exists at the time the AUL is recorded/registered. For example, if a mortgage is discharged before the AUL is recorded, the former mortgage holder is not a "current holder of any record interest".

A thorough title search is necessary to accurately identify all current holders of any record interest. Reviewing the property deed or Certificate of Title (with the memorandum of encumbrances) and any plans for the property can assist in identifying current record interest holders, but does not provide a comprehensive review. MassDEP recommends consulting an experienced real estate attorney or title examiner to conduct a title search to identify current holders of any record interest.

If there are no current holders of any record interest to notify, then there is no required waiting period as specified in 310 CMR 40.1074(1)(e). If there are current holders of any record interest to notify, the record interest holder may waive the waiting period. Such a waiver must be in writing and submitted to the Department (see 310 CMR 40.1074(1)(e)).

Q. 31 Can a record interest holder reject an AUL?

No. Consent of the record interest holder regarding implementation of the AUL is not required. However, if the property is subject to an easement, the disposal site must be cleaned up to a level consistent with the activities prescribed by the easement since such activities qualify as a current use and must be evaluated in the risk characterization. Current uses cannot be restricted by an AUL. Additionally, an AUL that infringes on the rights of an easement holder may subject the property owner to civil liability outside the MCP.

Q. 32 Pursuant to 310 CMR 40.1074(1)(e), current holders of record interest(s) must be notified of an AUL prior to the AUL being recorded/registered. Is there a form for this notice?

No. MassDEP has not created a form to notify current holders of any record interest. Parties intending to record/register an AUL should provide written notice to current holders of any record interest in the

Massachusetts Department of
Environmental Protection
One Winter Street
Boston, MA 02108-4746

Commonwealth of Massachusetts
Deval Patrick, Governor
Tim Murray, Lt. Governor

Executive Office of
Energy & Environmental Affairs
Ian A. Bowles, Secretary

Department of
Environmental Protection
Laurie Burt, Commissioner

Produced by the
Bureau of Waste Site Cleanup,
November 2007.
Printed on recycled paper

This information is available in alternate format by calling our ADA Coordinator at (617) 292-5565.

form of a letter that conforms to the requirements in 310 CMR 40.1074(1)(e).

This section of the MCP is fairly specific about what information must be given to current holders of any record interest and how it must be sent. The MCP requires that a certified letter, return receipt requested, be sent to all current holders of any record interest that contains the following information: a statement that there is contamination on the site (specify type, and although not required by the regulations, a description of the source of the contamination is useful); a description of where the contamination is located (the AUL survey plan could be used for this purpose); and the terms of the AUL (the uses and activities in the area subject to the AUL that are consistent and inconsistent with the AUL Opinion and obligations for maintaining the AUL).

Also, note the related requirement in 310 CMR 40.1074(1)(f) that the party signing the AUL certify "on a form prescribed by the Department" that he/she did indeed notify current holders of any record interest as required by 310 CMR 40.1074(1)(e). BWSC Form113, Activity and Use Limitation Transmittal form, has a check box to note whether there are such record interest holders, and if so, whether they were provided notice of the AUL.

Q. 33 What are the notification requirements for a Confirmatory AUL?

The public notice requirements for AULs (310 CMR 40.1403(7) and 310 CMR 40.1085(4)(e)) refer only to original, amended, released, or terminated AULs. Confirmatory AULs for simple corrections, such as incorrect references to persons or places or misspellings, do not require notice to the public or local officials.

Q. 34 When implementing a Confirmatory AUL to correct a mistake in the original AUL, must all exhibits to the original AUL be attached to the Confirmatory AUL?

No. The Confirmatory AUL is read in conjunction with the original AUL, so there is no need to duplicate the exhibits attached to the original AUL. If, however, an exhibit changes, that exhibit must be attached to the Confirmatory AUL.

While not required, it may be helpful to include Exhibit A (the metes and bounds description of the property) as an exhibit to the Confirmatory AUL, since the metes and bounds description is customarily used in real estate practice to identify the property. Also, keep in mind that while MassDEP does not require that the exhibits attached to the original AUL be attached to the Confirmatory AUL, the rules of the Registry of Deeds or Land Registration Office may require otherwise.

Note that when exhibits are not attached to the Confirmatory AUL, the AUL Form will reference exhibits that are not actually attached to the

Massachusetts Department of
Environmental Protection
One Winter Street
Boston, MA 02108-4746

Commonwealth of Massachusetts
Deval Patrick, Governor
Tim Murray, Lt. Governor

Executive Office of
Energy & Environmental Affairs
Ian A. Bowles, Secretary

Department of
Environmental Protection
Laurie Burt, Commissioner

Produced by the
Bureau of Waste Site Cleanup,
November 2007.
Printed on recycled paper

This information is available in alternate format by calling our ADA Coordinator at (617) 292-5565.

document. A clarifying sentence should be inserted into the AUL Form that indicates the exhibits are attached to the original AUL.

Q. 35 The following regulatory sections regarding Activity and Use Limitations refer to forms "prescribed by the Department" but I could not locate these specific forms among those listed at 310 CMR 40.1099 or on the web site. Do forms exist for the following?

310 CMR 40.1074(1)(b) Activity and Use Limitation Opinion

310 CMR 40.1074(1)(f) Certification Statement

310 CMR 40.1403(7)(b) Notice indicating recording of AUL

The AUL Opinion Form (BWSC113A) provides for the LSP opinion. The AUL Transmittal Form (BWSC 113) provides for the certification statement. Both of these forms are currently available at http://mass.gov/dep/cleanup/approvals/trforms.htm

The public notice form specified at 310 CMR 40.1403(7)(b) can be found at http://www.mass.gov/dep/cleanup/pubnot.doc

Q. 36 When there are multiple contiguous parcels of land that form the property on which an AUL will be implemented, may one AUL that references the multiple parcels or portions of such parcels be implemented? If so, how is this situation addressed on Form 1075, Notice of Activity and Use Limitation?

One AUL may be implemented if all parcels are owned by the same individual or entity, and are located in the same county.

The legal description for each parcel must be included in Exhibit A of the AUL. Multiple deed and plan references should also be provided in Exhibit A and cross-referenced on Form 1075. If the area to which the AUL applies includes both recorded and registered parcels of land, the AUL must be recorded at the Registry of Deeds first, and then registered at the Land Registration Office. The original AUL is kept on file at the Land Registration Office.

Massachusetts Department of
Environmental Protection
One Winter Street
Boston, MA 02108-4746

Commonwealth of Massachusetts
Deval Patrick, Governor
Tim Murray, Lt. Governor

Executive Office of
Energy & Environmental Affairs
Ian A. Bowles, Secretary

Department of
Environmental Protection
Laurie Burt, Commissioner

Produced by the
Bureau of Waste Site Cleanup,
November 2007.
Printed on recycled paper

This information is available in alternate format by calling our ADA Coordinator at (617) 292-5565.